

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JUAN M. CEPHAS,

Plaintiff and Appellant,

v.

CITY OF SAN DIEGO et al.,

Defendants and Respondents.

D052921

(Super. Ct. No. GIC873205, 37-  
2007-00065849-CU-OE CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.

In general, a litigant may not commence proceedings in an administrative forum on a particular claim and, before those proceedings have been completed, bring the same claim in a judicial forum. This principle is embodied in the doctrine of exhaustion of administrative remedies. In this case the doctrine bars appellant's claim.

Appellant is a police officer who commenced an administrative claim in which he alleged fellow officers were engaged in the unlawful practice of inflating the cost of

repairing property which had been defaced by graffiti. The officer alleged the cost inflation was a deliberate attempt to increase the potential penalty on members of a minority community. In his administrative claim he alleged that, after he objected to the practice, he had been subjected to retaliation.

The city administrative tribunal in which appellant initially made his claim rejected it as lacking evidentiary support. The officer then appealed to the city's civil service commission. While his administrative appeal was pending, the officer filed a complaint in the trial court in which he alleged that conduct which gave rise to his administrative claims also supported claims under Labor Code section 1102.5 and Government Code section 12940, subdivision (h). The trial court dismissed the officer's claims on the grounds he had failed to exhaust his administrative remedies.

On appeal the officer argues the trial court erred in considering the city's successful motion for summary judgment. The trial court had denied an earlier motion for summary judgment on the grounds the city's administrative proceedings did not provide the officer with an adequate remedy and in its second, successful motion the city relied upon additional provisions of its civil service regulations. Although the city did not fully comply with the procedural requirements which arose by virtue of the fact it had previously asserted exhaustion as a defense, these procedural shortcomings will not support a reversal of the trial court's judgment.

With respect to the merits of the trial court's ruling, the officer contends that the city's administrative procedure does not contemplate claims of retaliation under Labor Code section 1102.5, but is limited to discrimination claims. Where as is the case here,

according to appellant's administrative claim the unlawful behavior he reported and for which he claims he suffered retaliation, was part of an alleged overall scheme to discriminate against minority members of the community, appellant's claim was within the scope of the city's discrimination claims procedure. Accordingly, like the trial court, we find his judicial claims are barred by the doctrine of exhaustion of administrative remedies.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

#### 1. *Administrative Claims*

Plaintiff and appellant Juan M. Cephas has been employed as a police officer by defendants and respondents City of San Diego and San Diego Police Department (the city) since 1993. In 2003 he was assigned to the Graffiti Strike Force (GSF) where he worked under the supervision of Sergeant Lee Norton and with Officers Damon Sherman and Jay Farrington.

On April 5, 2006, Cephas submitted a "City of San Diego Internal Discrimination Complaint Form" to the city's Equal Employment Investigations Office (SDEEIO). The complaint alleged Cephas was of Hispanic origin and that he had been subjected to repeated acts of discrimination committed by Norton, Sherman and Farrington and that he had witnessed his fellow officers treat Hispanic suspects and officers in a discriminatory manner. Among other acts of discrimination, Cephas alleged Norton, Sherman and Farrington used a particular painting contractor to inflate the cost of repairing property damaged by graffiti. According to Cephas's administrative complaint:

"The officers had an unethical arrangement with a private painting company that would give the officers extravagantly inflated estimates for the repainting of property damaged by graffiti. The arrangement resulted in charging suspects, of a minority National Origin, with felony charges that would have otherwise been charged with misdemeanor charges that carried a much lenient [sic] penalty. . . . Norton encouraged everyone to use A Classic because they 'had a quicker turn around time and were more accurate.' Officer Collins and I opposed the practice of 'A Classic Painting.' I was concerned that the estimates would false [sic] convict minorities of felony crimes. A very high percentage of the people arrested by GSF are minorities. I refused to participate in the use of estimates by 'A Classic Painting' and opposed the subsequent oppression of minorities as a result of false felony estimates."

Cephas further alleged that "[s]ince I expressed my opposition to the discriminatory practices in the GST Unit, I have been subjected to a persistent pattern of retaliation. The Department Policies and Procedures are applied exclusively and strictly upon me; I have been ostracized from participating and interacting with others; I have been denied career enhancement opportunities as previously described; my reputation has been tarnished and my performance evaluations have been lowered."

On May 5, 2006, Cephas filed a nearly identical complaint with the United States Equal Employment Opportunity Commission (EEOC). The EEOC referred Cephas's complaint to the California Department of Fair Employment and Housing (DFEH), and on May 15, 2006, the DFEH issued a notice of right-to-sue in state court. The DFEH

notice stated the DFEH was closing its case "on the basis of 'processing waived to another agency.' "

On January 17, 2007, the SDEEIO determined there was insufficient evidence to substantiate Cephas's allegations of discrimination and retaliation. On January 29, 2007, he appealed the SDEEIO's determination to the San Diego Civil Service Commission (Civil Service Commission.)

## *2. Civil Complaints*

### *a. First Complaint*

On September 29, 2006, before the SDEEIO had issued its determination that Cephas's allegations lacked substantiation, Cephas filed a civil action (Case No. GIC 873205) in the trial court in which he alleged he had been subject to retaliation in violation of Labor Code section 1102.5. On April 12, 2007, Cephas filed a first amended complaint, in which he alleged among other matters that he had complained to a city police department's internal affairs investigator that Norton, Sherman and Farrington had unlawfully inflated the cost of repairing property damaged by graffiti and that as a result "certain minorities were being targeted to be falsely charged with felonies because of their race which Plaintiff considered to be a violation of both federal and state civil rights laws." Cephas further alleged that as result of his complaints to the internal affairs investigator, including his complaints about the inflated repair estimates, he had been subjected to retaliation in the form of negative performance evaluations, denial of promotions and other negative employment consequences.

*b. Second Complaint*

On April 27, 2007, Cephas filed a second complaint in the trial court. (Case No. 37-2007-0006589-CU-OE-CTL.) In the second complaint Cephas alleged he had suffered employment discrimination in violation of Government Code section 12940, subdivision (a), and retaliation for complaining about the discrimination in violation of Government Code section 12940, subdivision (h).

*c. Trial Court Disposition*

The city responded to the first complaint by filing a motion for summary judgment or in the alternative a motion for summary adjudication on the grounds that in light of the fact Cephas's appeal to the Civil Service Commission was still pending, he had failed to exhaust his administrative remedies. On July 20, 2007, the trial court denied the city's motion. The trial court stated the remedies provided by the city "are inadequate since they do not mention compensation for plaintiff's losses, reinstatement for positions that plaintiff was unlawfully denied, and [e]motional distress damages, relief all requested in plaintiff's first cause of action." In its order denying the city's motion for summary judgment, the trial court also consolidated Cephas's first and second complaints.

Thereafter, the city filed a second motion for summary judgment in the consolidated action. The city again argued Cephas's claims were barred by the doctrine of exhaustion of administrative remedies. However, unlike the first motion for summary judgment, in support of the second motion the city brought to the trial court's attention the city's Civil Service Rule XVI, section 4, which gives the Civil Service Commission

fairly broad authority to fully compensate aggrieved employees.<sup>1</sup> The trial court agreed with the city that its administrative remedies were adequate and that Cephas had failed to exhaust them. Accordingly, the trial court granted the city's motion for summary judgment and entered judgment dismissing the consolidated action.

Cephas filed a timely notice of appeal.

## DISCUSSION

### I

In his first argument on appeal, Cephas contends the trial court abused its discretion in permitting the city to bring a second motion for summary judgment based upon the doctrine of exhaustion of administrative remedies. He relies on the doctrine of res judicata and restrictions on motions to reconsider set forth in Code of Civil Procedure<sup>2</sup> section 1008, subdivision (a).

In general, an order denying a motion for summary judgment is not final and has no preclusive effect. (See *Lumbermens Mut. Cas. Co. v. Vaughn* (1988) 199 Cal.App.3d 171, 177; *De La Pena v. Wolfe* (1986) 177 Cal.App.3d 481, 485.) Thus the city's second motion was not barred by the doctrine of res judicata.

---

<sup>1</sup> Rule XVI, section 4 states in pertinent part: "The Commission may, at its discretion: [¶](1) order reinstatement of an employee who has been terminated; [¶](2) order an appointing authority to hire an applicant for employment; [¶](3) order payment of wages that have been lost or some portion thereof; [¶](4) order retroactive seniority credits; [¶](5) order placement of the complainant at the top of an eligibility list; [¶](6) direct an appointing authority to correct any discriminatory employment practice; or [¶](7) order any other remedies it deems appropriate."

<sup>2</sup> All further statutory references are to the Code of Civil Procedure unless otherwise specified.

Statutory limitations on renewal and reconsideration of motions do not undermine the trial court's order. First, we note section 1008, subdivision (a), upon which Cephas relies, has no application to the city's second motion for summary judgment. By its terms, section 1008 subdivision (a), governs a party's request that a trial court reconsider a prior order and "modify, amend, or revoke the prior order" and imposes a 10-day limit on a party's right to make such a motion. In making its second motion, the trial court was not seeking to have the prior order modified, amended, or revoked in any manner.

Arguably, the city's second motion was governed by section 1008, subdivision (b), which provides in pertinent part: "A party who originally made an application for an order which was refused in whole or part, or granted conditionally or on terms, may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." Section 437c, subdivision (f)(2), is also of some relevance here. In pertinent part it provides: "[A] party may not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court, unless that party establishes to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion." (§ 437c, subd. (f)(2).)

As the trial court noted when it granted the second motion for summary judgment, in the interim between the time the first motion was denied and the second motion heard, Cephas's second complaint, which added new claims under Government Code section



12940, subdivisions (a) and (h), was consolidated with the first complaint. Plainly, to the extent the second motion was directed at the new claims it was not a motion to reconsider or renewal of a prior motion for summary adjudication; the new claims were not the subject of the first motion because they were not a part of the action in which the motion was made.

Admittedly, to the extent the second motion was directed at Cephas's Labor Code section 1102.5 claim, it was a renewal of the first motion for summary judgment and subject to sections 1008, subdivision (b), and 437c, subdivision (f)(2). Moreover, because Civil Service Rule XVI, section 4, existed at the time the first motion was made, the city could not show new or changed facts, circumstances or law within the meaning of the statutes. (See *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1198-1200.)

However, the failure of the city to meet the requirements of these procedural statutes did not deprive the trial court of the power to reach the merits of the motion or obviate our obligation to determine whether, on the merits, the trial court erred. (See *In re Marriage of Barthold* (2008) 158 Cal.App.4th 1301, 1313-1314; *People v. Edward D. Jones & Co.* (2007) 154 Cal.App.4th 627, 634.) Article VI, section 13 of the California Constitution precludes reversal of a judgment "for any error as to any matter of procedure; unless, after an examination of the entire cause . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Accordingly, "[t]he California Constitution requires that in any case in which a trial judge reconsiders an erroneous order, and enters a new order that is substantively correct, the

resulting ruling must be affirmed regardless of any procedural error committed along the way. Because section 1008 must be construed to be consistent with constitutional principles [citation], it cannot be interpreted to preclude this result. [Citations.]" (*In re Marriage of Barthold, supra*, 158 Cal.App.4th at p. 1313, fn. omitted.) Here, as we explain below, the trial court's ruling on the merits of the city's second motion for summary judgment was correct and hence the Constitution precludes reversal for any failure of the city to fully comply with sections 1008 and 437c, subdivision (f)(2). (*Ibid.*)

## II

With respect to the merits, Cephas argues his Labor Code section 1102.5 claim was not cognizable in the administrative proceeding he initiated and therefore was not subject to the doctrine of exhaustion of administrative remedies. In addition, he claims that the administrative remedies did not provide him with due process. We reject his interpretation of the scope and adequacy of the administrative process he chose to pursue.

*Page v. Los Angeles County Probation Dept.* (2004) 123 Cal.App.4th 1135, 1141-1142 (*Page*), set forth the principles which bars Cephas's claim: "In *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074 (*Schifando*), the Supreme Court held that government employees who believe they have suffered employment discrimination may choose to pursue remedies provided by either the Fair Employment and Housing Act (FEHA) or internal grievance procedures such as a city, county or state civil service commission. Public employees who choose to file a complaint before the DFEH are not required to exhaust the remedies provided by a civil service commission. The *Schifando* court reasoned that some plaintiffs prefer the summary procedures of the civil service

commission while others would prefer to bypass the administrative process and file a lawsuit to vindicate civil rights, and that giving the choice of forum to plaintiffs best serves the legislative purposes of FEHA. (*Schifando*, at p. 1087.)

"The *Schifando* court made plain that, having chosen a forum for discrimination claims, a public employee must exhaust 'the chosen administrative forum's procedural requirements.' (*Schifando, supra*, 31 Cal.4th at p. 1088.) Moreover, if a public employee has requested a non-FEHA administrative remedy such as a civil service commission hearing and obtained an adverse decision, the employee must exhaust judicial remedies by filing a petition for writ of mandate in the trial court, or else the administrative decision will be binding on subsequent FEHA claims. (*Schifando*, at p. 1090.)

'[E]mployees challenging administrative findings [must] do so in the appropriate forum, by filing a writ of administrative mandamus petition in superior court. [This] ensures that employees who choose to utilize internal procedures are not given a second "bite of the procedural apple." ' (*Id.* at pp. 1090–1091.)" (*Page, supra*, 123 Cal.App.4th at pp. 1141-1142.)

Because Cephas chose to pursue his claims by way of a SDEEIO complaint and appeal to the Civil Service Commission, his only judicial remedy was by way of a writ of mandate challenging any adverse determination of the city's Civil Service complaint procedure. (*Page, supra*, 123 Cal.App.4th at pp. 1141-1142.)

Contrary to Cephas's argument, his Labor Code section 1102.5 retaliation claim was fully cognizable in the city's internal grievance procedure. Rule XVI, section 1 of the city's Civil Service Rules sets forth the city's anti-discrimination policy and rule XVI,

section 2, describes the scope of the administrative remedies available for violation of that policy: "INVESTIGATIONS: The Personnel Director shall investigate all complaints of discrimination because of race, color, marital status, religion, sex, sexual orientation, national origin, age, or disability filed by an employee, former employee, or applicant for City employment concerning an employment practice of the City." As we have noted, Cephas's Labor Code section 1102.5 claim is anchored in his allegation that his supervisor and co-workers were engaged in unlawful conduct motivated by racial animus. Thus although not all Labor Code section 1102.5 claims fall within the scope of the city's internal grievance procedures because the statute covers more than retaliation prompted by complaints about discriminatory conduct,<sup>3</sup> Cephas's retaliation claim, because it is firmly based on his allegation of discriminatory conduct, was well within the scope of the city's Civil Service Rules.

We also reject Cephas's contention that the city's grievance procedure did not afford him due process. The city's Civil Service Rules require the personnel director to "conduct a complete investigation of the complaint and present findings and recommendations to the Civil Service Commission." Thereafter, a complainant may appeal to the Civil Service Commission which is required to fix a time and place for a hearing of the complaint. At the hearing the complainant is given the right to present

---

<sup>3</sup> Labor Code section 1102.5, subdivision (b), states: "An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."

witnesses and testimony and the right to be represented by counsel. Moreover, the Civil Service Commission is required to make a decision on the merits of the complaint and if it finds in the complainant's favor, provide the complainant with an adequate remedy. In providing Cephas with the opportunity to be heard and the right to a decision on the merits of his complaint, the city's Civil Service Rules fully comply with the requirements of due process in an administrative context. (*Ohton v. Board of Trustees of California State University* (2007) 148 Cal.App.4th 749, 769.)

Cephas contends that because the Civil Service Commission had not acted on his appeal by the time the city's motion for summary judgment was heard, it should be estopped to assert the exhaustion doctrine. This argument is unpersuasive. Having attempted to circumvent the administrative process by filing a premature civil action, Cephas cannot complain that the city delayed the administrative process while it awaited the outcome of his judicial complaint. Requiring the city to proceed with the administrative process while the judicial complaint was still pending would in effect give Cephas two bites at the apple: if the administrative process came out favorably, he could rely on it; if it did not, he could continue to attack the process as ineffectual. While employees are certainly entitled to a fair process, so are employers. (See *Page, supra*, 123 Cal.App.4th at p. 1142.)

Finally, we also reject Cephas's contention the Supreme Court's recent opinion in *State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963, 971-978 (*Arbuckle*), relieved him of the obligation to exhaust his administrative remedies. In *Arbuckle* the court considered the particular provisions of Government Code section

8547.8(c), the state whistleblower statute, which expressly provides a damages remedy for state employees but only after the State Personnel Board has issued findings or failed to issue findings on an administrative complaint by the employee. In *Arbuckle*, the court found that an employee was only required to meet the specific conditions set forth in Government Code section 8547.8(c), rather than the broader exhaustion requirements discussed in cases such as *Schifando* and *Page*. (*Arbuckle, supra*, 45 Cal.4th at pp. 973-978.) Indeed, the court stated: "It is true as a *general* matter that writ review of an adverse administrative decision is a necessary step before pursuing other remedies that might be available. [Citations.] It is also *generally* true that if a litigant fails to take this step, and if the administrative proceeding possessed the requisite judicial character [citation], the administrative decision is binding in a later civil action brought in superior court. But, as discussed, the Legislature expressly authorized a damages action in superior court for whistleblower retaliation (§ 8547.8(c)), and in doing so it expressly acknowledged the existence of the parallel administrative remedy. It did not require that the board's findings be set aside by way of a mandate action; rather, it gave as the only precondition to the damages action authorized in section 8547.8(c), that a complaint be filed with the board and that the board 'issue[ ], or fail[ ] to issue, findings.' " (*Id.* at pp. 975-976.)

Here, Labor Code section 1102.5 does not have any express requirement that an employee exhaust any specific administrative remedy and thus, unlike Government Code section 8547.8(c), it has no limitation on how far an employee, who has nonetheless elected to pursue an administrative remedy, must proceed in the administrative tribunal.

Rather, claims under Labor Code section 1102.5 are subject to the *general* rule discussed in *Arbuckle*, which requires that once initiated an administrative remedy must be entirely exhausted before a damages claim may be made. (See *Page, supra*, 123 Cal.App.4th at p. 1142.)

Judgment affirmed.

---

BENKE, Acting P. J.

WE CONCUR:

---

McDONALD, J.

---

O'ROURKE, J.